

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CLARENCE WAGENAAR and KMI
ZEOLITE, INC.

Plaintiffs,

v.

NATHAN ROBISON; DIANE RANEY;
RAMM CORP GALTAR, LLC; ROBINSON
ENGINEERING, INC.; BUREAU OF LAND
MANAGEMENT; and GALTAR LLC,

Defendants.

Case No. 2:13-cv-01202-APG-PAL

**ORDER GRANTING DEFENDANT'S MOTION
TO DISMISS**

(Dkt. No. 7)

I. BACKGROUND

On July 9, 2013, Clarence Wagenaar and KMI Zeolite, Inc. ("KMI Zeolite") filed their Complaint in this Court, seeking the remedies of accounting, injunctive relief, declaratory relief, and damages for the tort of intentional interference with contractual relations.¹ Plaintiffs seek damages "in excess of \$10,000," for the pleaded claim and also for each of the unpleaded claims of conversion and civil conspiracy.²

The allegations supporting the claim are difficult to decipher, but seem to relate to a mining operation in Amargosa, Nevada which resulted in a trespass upon land owned by the Bureau of Land Management ("BLM"). In relevant part, the allegations seem to concern actions taken by defendant Galtar LLC at the mine site which resulted in the trespass, and statements or allegations made by Galtar LLC and by other defendants to BLM during BLM's administrative adjudication of the trespass action.

¹ (Compl., Dkt. No. 1.)

² Plaintiffs mention conversion and civil conspiracy only as part of their "Prayer for Relief," and do not plead them as distinct claims. (*Id.* at 4-5.)

1 Galtar LLC is the only remaining defendant, as the others have been dismissed by
 2 stipulation or because of Plaintiffs' failure to properly serve them with process.³ In the
 3 Complaint, Plaintiffs do not allege the domicile of Wagenaar, and they allege that KMI Zeolite is
 4 a Nevada limited liability company.⁴ However, the Nevada Secretary of State lists KMI Zeolite
 5 as a "foreign corporation" apparently out of Canada.⁵ As to the remaining defendant, Plaintiffs
 6 allege that Galtar LLC is a Nevada limited liability company.⁶

7 Galtar LLC has moved for dismissal with prejudice on multiple grounds: (1) lack of
 8 subject matter jurisdiction under Rule 12(b)(1); (2) failure to state a claim under Rules 8(a)(1) and
 9 12(b)(6); (3) failure to file the tort claim within the applicable statute of limitations; (4) failure to
 10 exhaust administrative remedies; (5) Nevada's anti-strategic lawsuit against public participation
 11 ("anti-SLAPP") statute;⁷ and (5) the *Noerr-Pennington* doctrine.⁸

12 13 **II. ANALYSIS**

14 **A. Subject Matter Jurisdiction — Fed. R. Civ. P. 12(b)(1)**

15 Two grounds exist for subject matter jurisdiction in federal court: federal question
 16 jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction under 28 U.S.C. § 1332.⁹ In a case
 17 filed initially in federal court, the plaintiff has the burden of establishing by a preponderance of
 18 the evidence that subject matter jurisdiction exists.¹⁰

20 ³ (Dkt. Nos. 18, 21, 26.)

21 ⁴ (Compl. ¶ 2.)

22 ⁵ The Court may take judicial notice of the Secretary of State's entity information. *See Smelt v.*
 23 *Cnty. of Orange*, 447 F.3d 673, 676 n.4 (9th Cir. 2006); 1 CLIFFORD S. FISHMAN & ANNE T. MCKENNA,
 24 *JONES ON EVIDENCE* § 2:86 (7th ed. 2013) ("Because judicial notice may be taken of public or official
 records, a court may take judicial notice of a corporate defendant's articles of incorporation which were
 filed with the Secretary of State.").

25 ⁶ (Compl. ¶ 1.)

26 ⁷ NRS § 41.660.

27 ⁸ (Mot. Dismiss, Dkt. No. 7.)

28 ⁹ *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006).

¹⁰ *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

1 The federal question statute provides that “the district courts shall have original
2 jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United
3 States.”¹¹ Plaintiffs’ poorly-pleaded claim (or claims, if the allegations in the Prayer for Relief
4 are interpreted as asserting conversion, civil conspiracy and unjust enrichment) are torts arising
5 under state law, and thus the Court does not have federal question jurisdiction.

6 Diversity jurisdiction requires that all plaintiffs be “citizens of different states” from all
7 defendants (i.e., “complete diversity”), and that the amount in controversy exceeds \$75,000.¹² A
8 corporation is a citizen of both its state of incorporation and the state where its principal place of
9 business is located.¹³ “[A]n LLC is a citizen of every state of which its owners/members are
10 citizens.”¹⁴

11 As to diversity jurisdiction, it is unclear whether the parties are completely diverse and
12 whether the amount in controversy exceeds \$75,000. Wagenaar’s domicile is unknown, and he
13 could very well be domiciled in Nevada. Although KMI Zeolite’s place of incorporation is not
14 Nevada, its principal place of business could be in Nevada. The citizenship of Galtar LLC’s
15 members is unknown, and thus it could be that Galtar LLC is a citizen of Nevada. Moreover,
16 there is scant basis in the Complaint to conclude that the amount in controversy is likely to exceed
17 \$75,000.

18 Ordinarily I would request more evidence as to diversity jurisdiction, but I need not take
19 that step because dismissal is also warranted for failure to state a claim under Rule 12(b)(6).

20 **B. Legal Standard — Fed. R. Civ. P. 8(a), 12(b)(6)**

21 A properly pleaded complaint must provide a “short and plain statement of the claim
22 showing that the pleader is entitled to relief.”¹⁵ While Rule 8 does not require detailed factual
23 allegations, it demands more than “labels and conclusions” or a “formulaic recitation of the
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25 ¹¹ 28 U.S.C. § 1331.

26 ¹² *Id.* § 1332(a), (b).

27 ¹³ *Rouse v. Wachovia Mortg., FSB*, 747 F.3d 707, 714 (9th Cir. 2014).

28 ¹⁴ *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006).

¹⁵ FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

1 elements of a cause of action.”¹⁶ “Factual allegations must be enough to rise above the
2 speculative level.”¹⁷ To survive a motion to dismiss, a complaint must “contain[] enough facts to
3 state a claim to relief that is plausible on its face.”¹⁸

4 District courts must apply a two-step approach when considering motions to dismiss.¹⁹
5 First, the court must accept as true all well-pleaded factual allegations and draw all reasonable
6 inferences from the complaint in the plaintiff’s favor.²⁰ Legal conclusions, however, are not
7 entitled to the same assumption of truth even if cast in the form of factual allegations.²¹ Mere
8 recitals of the elements of a cause of action, supported only by conclusory statements, do not
9 suffice.²²

10 Second, the court must consider whether the factual allegations in the complaint allege a
11 plausible claim for relief.²³ A claim is facially plausible when the complaint alleges facts that
12 allow the court to draw a reasonable inference that the defendant is liable for the alleged
13 misconduct.²⁴ Where the complaint does not permit the court to infer more than the mere
14 possibility of misconduct, the complaint has “alleged—but it has not shown—that the pleader is
15 entitled to relief.”²⁵ When the claims have not crossed the line from conceivable to plausible, the
16 complaint must be dismissed.²⁶ “Determining whether a complaint states a plausible claim for
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20 ¹⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

21 ¹⁷ *Twombly*, 550 U.S. at 555.

22 ¹⁸ *Iqbal*, 556 U.S. at 696 (internal quotation marks and citation omitted).

23 ¹⁹ *Id.* at 679.

24 ²⁰ *Id.*; *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir. 2013).

25 ²¹ *Iqbal*, 556 U.S. at 679; *Brown*, 724 F.3d at 1248.

26 ²² *Iqbal*, 556 U.S. at 678.

27 ²³ *Id.* at 679.

28 ²⁴ *Id.* at 663.

²⁵ *Id.* at 679 (internal quotation marks and citation omitted).

²⁶ *Twombly*, 550 U.S. at 570.

1 relief will . . . be a context-specific task that requires the [district] court to draw on its judicial
2 experience and common sense.”²⁷

3 **C. Plaintiffs’ Tort Claim**

4 Plaintiffs admit in their response to Galtar LLC’s motion that they have failed to state a
5 claim upon which relief can be granted.²⁸ I agree, as Plaintiffs’ allegations are nearly
6 indecipherable. Accordingly, I grant Galtar LLC’s motion on this ground. The dismissal is
7 without prejudice because Plaintiffs may be able to plead additional facts, if such facts exist, to
8 support their claim. Inasmuch as Galtar LLC relies on the statute of limitations to contend that
9 Plaintiffs cannot plead a viable claim, I decline to conclusively rule whether the statute of
10 limitations precludes Plaintiffs’ claim because there are issues concerning when Plaintiffs’ claim
11 accrued, when the statute began to run, and whether the statute has been or should be tolled that
12 cannot be resolved on the information presently before me.

13 The remaining issues are whether Galtar LLC’s costs and attorney’s fees are warranted
14 under Nevada’s anti-SLAPP statute or the federal *Noerr-Pennington* doctrine.

15 **D. Anti-SLAPP & *Noerr-Pennington***

16 The principals behind Nevada’s anti-SLAPP statute and the *Noerr-Pennington* doctrine
17 are essentially the same. Both are grounded in the rights of petition and free speech under the
18 state and federal constitutions, and both provide a privilege against suit if the basis of that suit is
19 good-faith communication made to any department of the government to petition for redress.²⁹

20 Here, Galtar LLC fails to sufficiently indicate how the allegations in the Complaint relate
21 to communications it made to the BLM as part of Galtar LLC’s ongoing administrative appeal
22 regarding the trespass. Galtar LLC submitted 39 pages of alleged communications between it and
23 the BLM,³⁰ but Galtar LLC provides no direction as to which portions of those 39 pages are

25 ²⁷ *Iqbal*, 556 U.S. at 679.

26 ²⁸ (Opp’n to Def.’s Mot. Dismiss 2, Dkt. No. 13.)

27 ²⁹ See *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006 (9th Cir. 2008);
28 *Moonin v. Nev. ex rel. Dep’t of Pub. Safety Highway Patrol*, 960 F. Supp. 2d 1130, 1146 (D. Nev. 2013).

³⁰ (Dkt. Nos. 7-6, 7-7.)

1 relevant to Plaintiffs' allegations.³¹ As the Seventh Circuit observed in its now familiar maxim,
2 "[j]udges are not like pigs, hunting for truffles buried in briefs."³² I thus decline to scour those 39
3 pages to decipher whether Plaintiffs' allegations are rooted therein. Furthermore, at least one of
4 Plaintiffs' allegations appears to relate to Galtar LLC's activities at the mine site rather than to
5 Galtar LLC's communications with the BLM: "On January 12, 2008, Galtar LLC directed
6 RAMM to move dirt in Amargosa[,] Nevada that caused BLM trespass."³³

7 Accordingly, I deny Galtar LLC's request for attorney's fees and costs under Nevada's
8 anti-SLAPP statute and the *Noerr-Pennington* doctrine.

9
10 **III. CONCLUSION**

11 In accord with the above, I hereby order:

- 12 1. Galtar LLC's motion to dismiss (Dkt. No. 7) is GRANTED.
- 13 2. Plaintiffs may amend the Complaint within 30 days of the entry of this Order if
14 sufficient facts exist to do so. If Plaintiffs do not file an amended complaint within
15 that time, this case will be dismissed.
- 16 3. Galtar LLC's request for costs and attorney's fees is DENIED.

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18 DATED this 21st day of August, 2014.



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20 ANDREW P. GORDON
21 UNITED STATES DISTRICT JUDGE
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26 ³¹ (See Mot. Dismiss 16.)

27 ³² *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

28 ³³ (Compl. ¶ 13.)